No. 13862

United States Court of Appeals
For the Ninth Circuit

NELSE MORTENSEN & CO., INC., *Appellant,*

— vs. —

KENNETH S. TREADWELL, Trustee of Puget Sound Products Co., a corporation, Debtor, and SEATTLE ASSOCIATION OF CREDIT MEN, *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLANT'S REPLY BRIEF

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REPLY TO ARGUMENT OF APPELLEES

The argument of appellees in their brief is based entirely upon the false premise that by agreement between the United States (acting through the War Assets Administration, or the Reconstruction Finance Corporation) the fixtures which are claimed by appellant had been severed from the real estate and converted into personal property.

What are the facts as they appear from the record?

The building upon the property involved was constructed by the Defense Plant Corporation for use as a "steel fabricating plant" (Tr. 208), in which equipment and machinery was installed by the owner of the property for the purpose of making the building

suitable and convenient for use as a fabricating or manufacturing plant.

In the early case of *Voorhis v. Freeman*, 2 Watts & S., 116, 37 Am. Dec. 490, it was said by the Supreme Court of Pennsylvania:

> "* * * Nothing but a passive regard for old notions could have led them to treat machinery as personal property when it was palpably an integrant part of a manufactory or a mill, merely because it might be unscrewed or unstrapped, taken to pieces, and removed without injury to the building. * * * Whether fast or loose, therefore, *all the machinery of a manufactory which is necessary to constitute it, and without which it would not be a manufactory at all, must pass for a part of the freehold.*" (Itacis ours)

In addition to the Washington cases which are cited in the Brief of Appellant, the following are a few of the cases from other jurisdictions in which this principle is discussed and followed:

Commonwealth Trust Co. v. Harkins (Penn.) 167 Alt. 278;

Detroit Trust Co. v. Detroit City Service (Mich.) 247 N.W. 76;

Gray v. Prudential Ins. Co. (Okla.) 77 P. (2d) 563;

Danville Holding Corp. v. Clement (Va.) 16 S.E.(2d) 345;

Metropolitan Life Ins. Co. v. Kimball (Ore.) 94 P.(2d) 1101;

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First National Bank v. Nativi (Vt.) 49 Atl.(2d) 760.

The sale of the property to Puget Sound Products Company was initiated by an offer set out in the "Invitation for Bids" which appears on pages 149 to 151, inclusive, of the Transcript of Record in this case, as Trustee's Exhibit No. 7. Therein, the War Assets Administration solicited bids "for the purchase or lease of certain surplus *real property facilities* hereinafter described," and the particular property referred to was designated as follows:

"Location and Description

"The real property offered for sale or lease is that portion of the Lake Washington Shipyards, owned in fee by the Government, located at Houghton, Washington, two (2) miles south of Kirkland, Washington, on the east shore of Lake Washington, and is *suitable for shipbuilding, ship repair, ship moorage, steel fabrication, manufacturing or various other small marine industries.*

"There are approximately 280,000 square feet of property with adjoining shore lands upon which there is a *building and improvements, hereinafter described.* (Note: All descriptions subject to final survey.)

"General Description of Facilities

"Land: Approximately 400′ x 700′ with adjoining shore land.

"Building: Steel fabricating building, 87′ by 300′, ceiling height 41′, mill type, heavy wood construction, concrete pier foundation, corru-

gated steel siding, composition roof. Building constructed in 1940.

"Craneways: Two craneways, 34′ x 490′.

"Shipways: Two and one-half shipways.

"Equipment: 1—45-ton Whirley Crane; 1—7½-ton Bridge Crane; 1—15-ton Bridge Crane; 1—10-ton Bridge Crane; 1—350-ton Joggling Press; 2—Acetylene Generators; 1—Auxiliary Fire Pump; 1—Worthington Air Compressor; 114—Bending and Welding Slabs with stools; 6—Jib Cranes; 1—Trumbull Switchboard; 13—Transformers; 3—200 KVA, 5—100 KVA, 3—50 KVA, 2—75 KVA."

It is apparent that what the United States was offering for sale or lease was not merely the land and the bare frame of a building thereon, but a complete manufacturing plant, including the machinery and equipment therein. As was said in the case of *Danville Holding Corp. v. Clement, supra*:

> "The general course of modern decisions in American courts no longer follows the old common law doctrine that the mode of annexation, slight and temporary, or immovable and permanent, is the single criterion for determining the character of chattels as fixtures. Today, emphasis is placed upon the nature of the article and upon the uses and purposes for which it is held or employed. The method of the annexation to the realty receives slight consideration and then only as a circumstance from which the intention of the annexor may be deduced.
>
> "This later rule is due to great advances in the science of mechanical engineering, bringing on great changes in industrial conditions, and creating a situation in the manufactories in which *a*

building is only one of the incidents or accessories of a manufacturing plant considered as a unit.

* * * * * * * * * *

"* * * The machinery was essential for the conduct of the character of business which Walters said he intended to establish. It was placed in the building to carry out the very purpose for which the building was acquired, adapted, occupied and used. Its very nature, its cost, manner of annexation to the building, and the purpose to which it was devoted, all negative any idea of a temporary venture."

After a draft of the proposed promissory notes and mortgages had been prepared by the War Assets Administration and submitted to the Puget Sound Products Company, the attorney for the company wrote a letter to the War Assets Administration (Ex. 19, Tr. 256 to 259) requesting that the documents be modified so that they would not include *after-acquired property.* The portion of the proposed real estate mortgage which he requested be deleted (so far as material here) consisted of the following:

"In addition to the real property hereinabove described, this indenture also covers and includes all other property of like nature to that hereinbefore described which may hereafter be acquired by the Mortgagor *for use in the plant conveyed.*"

It is significant that no objection whatever was made to the inclusion in the real estate mortgage of the "building, structures and improvements" located on the property; and it is also significant that the property offered and conveyed, and subsequently mortgaged, is referred to as a "plant" suitable for "ship-

building, ship repair, ship mooring, steel fabrication, manufacturing or other small marine industries."

Certainly nothing in the negotiations and transactions between the parties could be interpreted or construed as an agreement "fixing the status of the machinery and equipment as personalty." If that had been the intention, the attorney for Puget Sound Products Company, who was carefully editing the promissory notes and mortgages, would certainly have requested that not only the "after-acquired" property, but also the "improvements" then located on the premises, be excluded from the provisions of the real estate mortgage.

As was said in the case of *First National Bank v. Nativi* (Vt.) 49 Atl.(2d) 760, *supra*:

> "It is now well recognized that as between mortgagor and mortgagee, where a building is specially adapted to certain uses, machinery attached thereto that is essential to the purpose to which the building is devoted and is intended for permanent use therein becomes a fixture regardless of the manner of its annexation. [Citing cases.]"

When the mortgage from the Puget Sound Products Company upon the real estate and improvements was foreclosed, and the property sold to the United States at Marshal's sale, the United States acquired title to all of the fixtures and improvements located in the building on the premises and installed therein to make the property suitable and convenient for the purposes for which the property was used, namely, a manufacturing and fabricating plant. Surely the wiring, trans-

formers, switchboard, cranes and equipment could not have been removed from the building by the mortgagor after the sale, leaving the United States, as purchaser at the foreclosure sale, with nothing but a bare building. What it purchased was a manufacturing plant.

Appellees suggest in their brief that the fact that appellant purchased from the Seattle Association of Credit Men the right to redeem the property from the Marshal's sale might have some bearing upon the question as to whether the fixtures and improvements were to be considered as personal property or as part of the real estate. We submit that such is not the case. The Seattle Association of Credit Men held a second mortgage upon the real estate, and its interest in the real estate (including the fixtures and improvements thereon) had been foreclosed. The only right left to it, so far as the real estate was concerned, was a right to redeem from the Marshal's sale, which would have required the payment of a large amount of money. When even this right (of questionable value) was about to expire, it sold the right of redemption to appellant for $750.00. If the property had not been redeemed, the United States would have acquired, by the Marshal's deed, the land and the improvements and fixtures located thereon, as a complete manufacturing plant, and that is exactly what the appellant acquired when it redeemed the property and received the Marshal's deed. By the assignment to appellant of its right of redemption, the Seattle Association of Credit Men sold something that had no value to it, and received therefor a substantial consideration. Whether

or not the property was redeemed, all right of the Seattle Association of Credit Men to the real estate and the fixtures and improvements had been extinguished by the foreclosure action.

It is true that a chattel mortgage (Tr. 159 to 163) was executed by the Puget Sound Products Company to the United States, to secure a certain promissory note for $32,678.40, covering the fixtures and equipment located in the building; and if the United States had seen fit to foreclosure the chattel mortgage and sell the fixtures and equipment covered thereby, there would have been a severance of the fixtures and equipment from the real estate. This chattel mortgage, however had been paid in full, and the possibility of any foreclosure or severance had been eliminated. Upon the release of the chattel mortgage, the fixtures and equipment covered thereby retained their status as improvements to the real estate and were subject to the mortgage upon the real estate which was foreclosed by the United States. *Parrish v. Southwestern Washington Production Credit Assn.*, 41 Wn. (2d) 586, 250 P. (2d) 973.

We have searched the record vainly for any "agreement" fixing the status of the fixtures and improvements as personal property, and no such agreement can be found. If there had been such an agreement, the real estate mortgage would have excluded the structures and improvements therefrom, but, instead, they were expressly included therein. The alleged agreement is merely "wishful thinking" on the part of the appellees, and has no basis in fact.

We wish to apologize to the court for the inadvertent misstatement on page 26 of the opening brief, as to the holding of the Supreme Court in the case of *Westinghouse Co. v. Hawthorne*, 21 Wn.(2d) 74, 150 P.(2d) 55. This error is pointed out on page 28 of the Brief of Appellees. That was an action to foreclose a materialman's lien, and the court said that in order to render real property subject to foreclosure for such a lien, it must appear that the articles alleged to be lienable have become fixtures. The items held not to be fixtures were articles being used on boats in the process of manufacture, and articles and motors used on portable machinery moved from one place to another for temporary use. However, the court did hold that the wiring and accessories constituted fixtures, and stated:

> "Appellant furnished a large quantity of wiring and material essential to the placing, maintenance, and use thereof. This wire, whether unprotected or in conduits or otherwise covered, was attached to the building, and was, of course, in the open, the building being of single construction. Manifestly, wiring for electrical power and light is an essential part of a plant such as here in question. The wiring must be attached in some way to the building, hence to the realty, and the fact that the building may be of single construction is immaterial.
>
> "The evidence supports appellant's claim of lien for the wiring, accessories, and appliances used in connection therewith."

We respectfully submit that the appellant in this case acquired by the Marshal's deed the complete

manufacturing plant covered by the Puget Sound Products Company's mortgage; that the mortgagor has no right to the fixtures and improvements claimed by appellant, and that the Trustee likewise has no right, title or interest therein. The fixtures and improvements, as well as the land and the building thereon, belong to appellant.

Respectfully submitted,

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HERMAN HOWE, *of Counsel,*
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